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VIA ELECTRONIC FILING

Mr. Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Re: *Stephens Media, LLC, d/b/a Hawaii Tribune-Herald and Hawaii Newspaper Guild Local 39117, Communications Workers of America, AFL-CIO*, Cases 37-CA-7043, 37-CA-7046, 37-CA7047, 37-CA7048, 37-CA-7048, 37-CA-7084, 37-CA-7085, 37-CA7086, 37-CA7087, 37-CA-7112, 37-CA-7114, 37-CA-7115, and 37-CA-7186.

Dear Mr. Heltzer:

The Association of Corporate Counsel[1] deeply appreciates the Board's invitation to submit this *amicus* letter in the above-referenced matter. This brief submission focuses on the work product protection issue identified in the Board's request and makes the following two points:

- Internal investigations have come to serve an important role in litigation risk management. The Board should therefore articulate its approach in light of this broader impact (beyond the unfair labor practice context).

- Work product protection protects **proactive** legal risk assessment. The Administrative Law Judge improperly focused on the lack of a specific claim at the time of the preparation of the employee witness statement.

The Association of Corporate Counsel has a strong interest in ensuring that its members are able to provide their clients frank and thorough legal advice; to be able to do so, attorneys must not be chilled from thoroughly investigating the legal problems faced by their clients.

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[1] ACC is the bar association for attorneys employed in the legal departments of corporations and private-sector organizations worldwide. ACC has more than 26,000 members in over 75 countries, employed by over 10,000 organizations. ACC offers the unique perspective of in-house lawyers, who provide corporate legal counseling to their clients on a daily basis across every industry and in-house practice setting.

The work product privilege is indispensable to the administration of justice. The scope of this privilege has evolved significantly since the Supreme Court first articulated it in *Hickman v. Taylor*, 329 U.S. 495 (1947)—as has the legal system. In the 1940s, the volume of civil litigation was much less than it is now, and criminal prosecution of corporations was rare. Many corporations were therefore fundamentally reactive in their approach to litigation, hiring outside counsel to resolve legal problems after they had arisen, rather than seeking preventive advice to avoid problems before they arose or assess the litigation risks of business decisions. *See* Liggio, Sr., *A Look at the Role of Corporate Counsel*, 44 Ariz. L. Rev. 621, 623 (2002). The work-product doctrine announced in *Hickman* understandably reflected those circumstances, and that case involved materials created "in the course of preparation for possible litigation after a claim has arisen." 329 U.S. at 497.

Hickman itself recognized, however, that work-product protections would not be static. Because the work-product doctrine is an instrument of "public policy," driven by "the interests of the clients," 329 U.S. at 510, 511, it must reflect the "background of custom and practice," *id.* at 518 (Jackson, J., concurring). And in the decades following *Hickman*, there was a dramatic change in the "custom and practice" of how corporations managed their litigation risks. Beginning in the 1960s, there was a burst of civil litigation, much of it involving corporations. Liggio, *supra*, at 624. Simultaneously, Congress created several administrative agencies, each with its own enabling statutes, implementing regulations, and enforcement authority. *Id.* The SEC, the IRS, and the Justice Department also significantly expanded their investigation of and enforcement against questionable actions by corporations. See Duggin, *The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility*, 51 St. Louis U. L.J. 989, 1011 (2007).

In response, corporations necessarily began to take a more proactive approach to litigation through preventive counseling. Before initiating any important transaction, corporations now ask their attorneys for advice about the legal risks involved. Chayes & Chayes, *Corporate Counsel and the Elite Law Firm*, 37 Stan. L. Rev. 277, 283 (1985). Institutionalized compliance programs are now commonplace in most every major company, and certainly in almost all public companies, not only because the risks of non-compliance are so large, but also because of the increasing requirements of regulation at local, national, and international level. Counsel can provide preventive and pro-active advice only after thoroughly investigating the facts and candidly analyzing the legal issues. This process enables companies to structure their business decisions to avoid future litigation by focusing on how to avoid or prevent legal problems (or minimize risk) in the first place. And, when misconduct is alleged, companies depend on their in-house counsel to quickly assess the legal risks, after thoroughly investigating the underlying facts.

This Board has recognized the importance of the work product protection. In *Central Telephone Co. of Texas*, 343 NLRB 987 (2004), the Board underscored the connection between the doctrine and success of "the adversarial process." *Id.* at 988.

The Board then recited the familiar standard that "the essential question in determining whether a document qualifies as work product is 'whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation.'" *Id.* (citing *Senate of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 586 n.42 (quoting 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2024 (1970) (emphasis in original)). Indeed,

> [t]he prospect of litigation need not be actual or imminent; it need only be fairly foreseeable. The privilege extends to documents prepared in anticipation of foreseeable litigation, even if *no specific* claim is contemplated at the time the documents are prepared. Thus, it is *not necessary* for a specific claim to have been threatened or filed at the time of the document's creation, as long as the document was prepared in anticipation of foreseeable litigation.

Id. at 989 (citations and internal quotation marks omitted) (emphasis added).

Nevertheless, the ALJ in the present matter, after reciting the basic work product doctrine, proceeded to treat the lack of a specific claim as somehow talismanic of the lack of anticipation of litigation necessary for work product protection. And, making matters worse, the ALJ viewed the issue from the perspective of the union, rather than the employer ("[t]he Union was not yet in possession of the information to make a decision whether to pursue a grievance much less decide to proceed to arbitration.").

Both of these errors seriously undermine the protections that the work product privilege was designed to afford clients in order to encourage them to think about legal issues and consult with their attorneys on both the seemingly routine and the most sensitive matters.

First, by requiring a specific and identifiable dispute in order to merit work product protection, the ALJ empties the protection of any application in the proactive lawyering context. Not only is this contrary to established precedent governing the work product doctrine, but the ALJ's approach is also unsound as a matter of policy. Proactive legal investigation and risk assessment is integral to the success of modern business and must be protected to ensure candor among senior executives and their legal counterparts. If proactive lawyering must be later disclosed to an adversary, business executives will be less interested in having their lawyers conduct thorough investigations and providing legal risk assessments before the dispute is docketed. That outcome would be harmful for all stakeholders, including the government.

Second, whether work product protection applies must be viewed through the lens of the preparer of the documents, *i.e.*, in this case, the employer. In-house counsel, based on the facts within their knowledge, make contingent assessments about the prospect of litigation. The fact that the union did not yet have the requisite knowledge is completely

immaterial to that assessment, as in-house counsel surely understood the likely consequence of launching disciplinary action.

The ALJ's misguided approach undermines the efforts of in-house counsel to ensure that senior executives obtain the benefit of thorough investigation and analysis of legal issues. The Board, if it reaches the issue of work product protection for employee witness statements, should reaffirm its precedent that a specific claim is not required so as not to discourage the very preventive counseling that is critical to modern corporate compliance initiatives.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the foregoing AMICUS LETTER OF THE ASSOCIATION OF CORPORATE COUNSEL was served via Federal Express on this 1st day of April on the following:

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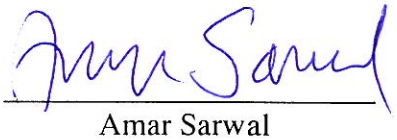

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